

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

ORIGINAL

76-4151
76-4153

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-4151, 76-4153

GREENE COUNTY PLANNING BOARD, et al.

Petitioners

v.

FEDERAL POWER COMMISSION,

Respondent

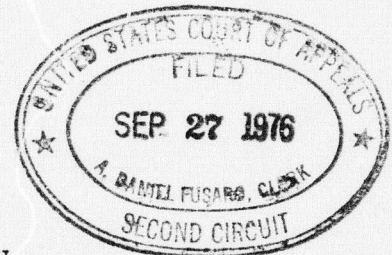
POWER AUTHORITY OF THE STATE OF NEW YORK

Intervenor

BRIEF OF PETITIONERS
GREENE COUNTY PLANNING BOARD
AND TOWN OF GREENVILLE
ON PETITION TO REVIEW ORDERS
OF THE FEDERAL POWER COMMISSION

September 27, 1976

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PRELIMINARY STATEMENT

This case arises from the extended (from 1968 to the present time) attempts by the Power Authority of the State of New York ("PASNY") to obtain permission from the Federal Power Commission ("FPC") to build a 35-40 mile extra high voltage electrical transmission line from Gilboa in the northern Catskills through a scenic rural and forested landscape in Greene County to Leeds on the Hudson River in New York State (the "Gilboa Leeds line").

Brought here for review under Section 313(b) of the Federal Power Act (16 USC §825 1(b)) are two orders* of the FPC which granted PASNY permission to build the Gilboa Leeds line and other facilities.

This permission was granted even though the Federal Environmental Protection Agency and New York State Department of Environmental Conservation each separately found the FPC environmental impact statements prepared pursuant to the National Environmental Policy Act of 1969 (42 USC §§4321 et seq.) ("NEPA") to be too deficient even to be commented upon. The primary deficiency was the failure of the FPC to analyze and consider the Gilboa Leeds line, and programmatic alternatives to such line, as a necessary

* Opinion No. 751 issued by FPC Chairman Richard L. Dunham 3/26/76 (R. 7297-7332 and A. 64-98) and Opinion No. 751-A issued per curiam on 4/27/76 (R. 7347-7355 and A. 110-117). References to the Record, other than the hearing transcript, are prefixed by an "R". The prefix "Tr." denotes a reference to the hearing transcript which composes the first 4047 pages of the Record. Portions of the Record have been reproduced in a Deferred Joint Appendix and, where possible, parallel citations are made to the Appendix prefixed by an "A".

and perhaps prerequisite, segment of a far larger PASNY program (much of which was subject to FPC and other Federal regulations) of electric power facilities in and around Greene County.

In addition, the FPC refused to hear evidence that the reports and other materials upon which it relied as to electric power loads in New York State--a central issue in the case--had been found to be erroneous.

The FPC denied a petition to rehear Opinion 751 on April 27, 1971 (R. 7354, A. 116) and to rehear Opinion 751-A on June 7, 1976 (R. 7359, A. 120).

The petitioners in case No. 76-4151 (the Greene County Planning Board and Town of Greenville, collectively hereafter "Greene County") represent the county and town to be chiefly impacted by the PASNY facilities to be built pursuant to the FPC orders. Greene County had been an active intervenor in the administrative proceedings before the FPC.

The FPC Administrative Law Judge before whom the trial type administrative hearings were held, and who issued the Initial Decision (R. 7045-7106, A. 1-63) in this case which was adopted by the FPC in Opinion 751, was Hon. William C. Levy.

Aspects of this case have previously been before this Court resulting in decisions reported at 455 F. 2d 412 (1972) (Greene County I), 490 F. 2d 256 (1973) (Greene County II), and 528 F. 2d 38 (1975) (Greene County III).

QUESTIONS PRESENTED

1. Where PASNY applied for FPC permission to build a transmission line to be an integral part of a multi-phased program of major related facilities -- some already under FPC license and others for which license applications had been filed with the FPC and other agencies -- did the FPC err when it approved the line (a) without evaluating in a comprehensive manner the environmental, cumulative and other impacts of the entire program of proposals pending concurrently before the FPC and other agencies, (b) without considering broad range alternatives both to the line and the program and (c) while relying upon data as to electric power usage, allegedly justifying the need for the line, which had been found by authoritative sources to be erroneous?

2. Did the FPC err when it approved the Gilboa Leeds line even though the detailed environmental statement prepared by its Staff was woefully inadequate?

3. Did the FPC err when it made its decision based upon a Record compiled in a highly irregular administrative proceeding in which the presiding Administrative Law Judge made numerous material prejudicial errors?

FACTS

In the late summer of 1968 PASNY filed an application with the FPC for a license under Section 4(e) of the Federal Power Act (16 USC 797(e)) for the Blenheim Gilboa Pumped Storage Power Project. The application (R. 7441) described the Blenheim Gilboa Project as a 1,000,000 kw pumped storage generating facility consisting of two reservoirs on the Schoharie Creek in the northern Catskill region of New York State, including tunnels and other facilities connecting the two reservoirs, a combination pumping-generating plant, some recreation facilities and a switchyard.

Some Important Aspects of the PASNY Application

Since the original 1968 application commenced the administrative proceeding culminating in the orders brought to this Court for review, it is important to note a number of significant items of the application:

1. No Transmission Lines Were Included.

The application did not include any transmission lines as part of the proposed project works for which the license was sought. It merely stated that the switchyard would be connected to three 345,000 volt (345 kv) transmission lines.*

* It is now pretty clear that the Blenheim Gilboa project was originally designed by PASNY to feed only two 345 kv transmission lines (Tr. 898, 903, 1017-1018). A third connected transmission line was added in the latter stages of project design at the suggestion of engineers outside of PASNY as a way of "piggybacking" on to this project some statewide objectives they had in mind. The Cornwall Project, a pumped storage hydroelectric project with twice the capacity of the Blenheim Gilboa Project, as this court well knows, was approved by the FPC with the equivalent of only two 345 kv transmission lines carrying power out of the plant on a common right of way. See Scenic Hudson Preservation Conf. v. FPC, 354 F. 2d 608 (2d Cir. 1965) cert. den. 384 U.S. 941 (1966) (Scenic Hudson I).

2. The Project Was to Serve Upstate New York.

The application rather pointedly alleged that the purpose of the Blenheim Gilboa Project was to serve "peak loads of the upstate New York systems (loads of Applicant, Central Hudson, Niagara Mohawk, New York State Electric and Gas and Rochester Gas and Electric companies)" (Exhibit I to the application and paragraph 10 of the application) (R. 7446). For this reason, the application contained estimated peak electric load data for upstate New York. Except to mention that Blenheim Gilboa power would be available for regional energy emergencies, the application contains not even a hint that New York City would be the primary beneficiary of Blenheim Gilboa power.

3. This Was To Be the Only Plant on the Affected Waterway.

Exhibit I of the application also stated that "the Applicant has no plan for future proposed hydro projects on the Schoharie Creek." (R.7500). In the shifting sands of PASNY and FPC justifications, each of these original representations became inconsistent with the reasons later given for the Gilboa Leeds line.

The License Is Summarily Issued

On June 6, 1969, without holding a public hearing, the FPC promulgated an order issuing a license to PASNY for the Blenheim Gilboa Project (41 FPC 712) (R. 3548-5697). Asserting jurisdiction under Section 3(11) of the Federal Power Act (16 USC 769(11)), the FPC included three 345 kv transmission lines as part of the project works: the Gilboa Leeds line; another running through Albany County to a sub-station at New Scotland ("New Scotland line");

and the third running through Delaware County to a sub-station at Fraser ("Fraser line") (R. 5655).

While from time to time various participants in this proceeding have tried to treat the Gilboa Leeds line as "licensed", the FPC has previously conceded

"that the June 6, 1969 license of the Blenheim Gilboa Project did not commit it to authorize construction of the Gilboa Leeds Line." (Greene County I, 455 F. 2d at 424)

See Article 34 of the license (R. 5658-5659).

Transmission Line Approval Is Sought

PASNY sought FPC approval of the three proposed transmission lines on or about December 11, 1969. (R. 7602) For the first time notice was given to Greene County and some of the other municipalities to be affected by the transmission lines. In response to this notice Greene County filed a petition to intervene. (R. 5731-5735).

Transmission Line Approval Is Summarily Given

Without holding a public hearing, without ruling on petitions to intervene and without complying in any respect with NEPA, on April 10, 1970 the FPC approved the Fraser and New Scotland lines, while reserving decision on the Gilboa Leeds line (43 FPC 521) (R. 5701 - 5707).*

* This Court has previously noted that the approval of the Fraser and New Scotland lines was thoroughly illegal and with respect to these lines that "there can be no question that the Commission failed to comply with NEPA" (Greene County I, 455 F. 2d at 424). The power plant and the Fraser and New Scotland lines have been constructed. They were put into operation in 1973.

The Proceeding Continues

After interventions were permitted by Greene County and others (R. 5737-5738), PASNY reapplied to the FPC for approval of the Gilboa Leeds line on December 2, 1970. This reapplication contained two alternative routes for the line -- A and B (R. 5739-5755). In addition, under the FPC rules then in effect, PASNY published an "Environmental Report" concerning its proposal (R. 4269-4324).

Thereupon the FPC ordered a hearing to be held (R. 5780-5782) and scheduled a prehearing conference for June 22, 1971 in Washington, D.C.

The Prehearing Conference

The prehearing conference identified a number of the key issues which were to persist throughout the remainder of the proceedings:

1. The lack of need for the Gilboa Leeds line (Tr. 15) and its interrelationship with other PASNY projects (Tr. 6-7).
2. The failure of the FPC to comply with NEPA (Tr. 47).
3. The fees and expenses associated with participation in the proceeding by Intervenorors (Tr. 22, 49).*
4. The conduct of the hearing in a manner to afford due process to all parties (Tr. 17, 20, 22, 24).

* Greene County joins in the brief on fees and expenses submitted by the petitioners in companion case 76-4153 and will omit any further discussion of that issue in this brief.

While the prehearing conference identified key issues, it by no means resolved or narrowed them. In fact, if anything, the prehearing conference opened more questions than it answered.

Thus, PASNY announced at the prehearing conference:

(1) That it was going to build another 1,000,000 Kw power plant (the Breakabeen Project) at the Gilboa end of the Gilboa Leeds line on the Schoharie Creek (Tr. 6) (no mention was made of the representation in the application that no further projects were planned); and

(2) That the Gilboa Leeds line was really to be the Gilboa Leeds right of way for two or more high voltage transmission lines to serve more than just the Blenheim Gilboa Project (Tr. 7-8).

In addition, other critical prehearing issues raised at the conference were deflected by Judge Levy who requested formal written motions on some issues* and informal discussions on issues relating to prehearing discovery (Tr. 13-14, 24-26).

Motion Practice and Discovery

The motion practice and discovery aspects of this case surely must rank among the most peculiar in history.

Two judges of this Court have already had occasion to comment on the way in which the FPC perverted motion practice and

* Written motions were requested on the locations of the hearing (Tr. 17), the adequacy of the notice for the proceeding (Tr. 20-21, 28, 33), the fees and expenses of intervenors (Tr. 23, 154, 61) and the timing for the FPC to file its detailed statement under NEPA (Tr. 47).

discovery in this case. Thus, in Greene County I, Chief Judge Kaufman commented:

"[W]e are constrained to note that the Commission at nearly every turn had made it difficult procedurally for the intervenors." (Greene County I, 455 F. 2d at 417, footnote 12).

Likewise, in Greene County II, Judge Mansfield characterized the FPC's conduct as "procedural cat and mouse games" (490 F. 2d at 260), called for a halt in "the heraclitean flux in the FPC's procedures" and pointed out:

"The pattern which emerges from the FPC's conduct is clear. The FPC first defers, then transfers, all in an attempt to thwart review..." (Greene County II, 490 F. 2d at 259-260)

While motions were promptly made on the various issues raised by the prehearing conference, no decisions were made by the FPC until after it was sued. By this time, the hearings had begun in total confusion because of the failure to resolve threshold issues.*

When ruling upon requests for discovery by intervenors, Judge Levy took his lead from the FPC. After turning aside discovery requests at the prehearing conference as "premature" (tr. 27), although logically that is the time for prehearing discovery to be scheduled, Judge Levy announced his general "rule" for discovery

* Much of this confusion persisted throughout the hearing. See, for example, the discussion at Tr. 2363-2383, 2424-2425, 2828 and 2839 some five years after the original application was filed and after 16 hearing days where Judge Levy, the FPC Staff, and the intervenors were not even able to discern exactly what PASNY had applied for in this proceeding.

by addressing PASNY as follows (Tr. 188):

"I assume that to the extent you feel it is necessary and desirable you will make production of whatever you consider appropriate."

In this unique view, discovery procedures are a matter of charity to be dispensed at the will of the party possessing the information.*

This was Judge Levy's inflexible attitude throughout the case. Even when a witness testified about a document or data, all requests by Intervenors were turned aside with a refusal to "direct" any party to give any information to any other party (Tr. 516, 548, 551, 597, 603, 712, 724, 731, 1526-1527), even after the underlying injustice of his position was pointed out to the Judge (Tr. 558), and even after PASNY itself examined its own witness as to the contents of documentary data as to which the Judge previously denied discovery (Tr. 587-588), and even after the request for information had been reduced to a writing specifying the information needed and furnished to the Judge, which apparently he did not bother to read (Tr. 707-712, 715-732), and even when the request for information was made at a time and in the form previously ruled by the Judge to be proper (Tr. 1526-1527; 1786-1787).

* In this connection it should be noted that one intervenor had to sue the Commission in order to get compliance with the Freedom of Information Act. (Town of Durham v. FPC, 71 Civ. 3993, 1 ELR 20592 (S.D.N.Y. 1971) Judge Levy would not even order Staff to comply with a clear statutory direction although he had been specifically asked both in writing and orally to direct the FPC Staff to comply. Compare Recommendation 21 of the Administrative Conference of the United States adopted June 2, 1970.

The pattern of conduct of the Judge was plain: first the requests are too early, then they are not in writing, when in writing they are not specific enough, when specific they should be held for cross examination, when raised during cross examination the "need" for discovery is not strong enough or the request is deemed a dilatory interruption of the hearing.

The failure to afford intervenors any opportunity for discovery deprived them of due process and deprived the Record of relevant and material information concerning the fundamental issues in this proceeding. It also resulted in many instances in cross examination being a substitute for discovery.

Frustrated by the Kafkaesque refusal of the FPC to rule on basic prehearing issues, Greene County on October 22, 1971 petitioned this Court for relief in Greene County I. A stay of the beginning of the hearing pending review was denied.

The Hearing Begins Under A Cloud

The hearing before Judge Levy began in Albany, New York on November 9, 1971 (1) without there being any adequate prehearing discovery (Tr. 187-189) and (2) with Greene County I then before this Court.

Hearings continued for some eleven days during November and December of 1971 and into January 1972 (Tr. 63-1860) until this

Court decided Greene County I. *

Greene County I Sends the FPC Back to the Drawing Board

In Greene County I, this Court addressed each of the major issues raised at the prehearing conference.

(1) On the question of the need for the Gilboa Leeds line and its interrelationship with other PASNY Projects, this Court pointed out that under both the Federal Power Act and NEPA the FPC had a planning responsibility and that

"The Federal Power Act does not command the immediate construction of as many projects as possible and that the determination whether to license any one project 'can be made only after an exploration of all issues relevant to the "public interest" including future power demand and supply, alternate sources of power..."
(Greene County I, 455 F. 2d at 423)

and also

"But we fail to see how the Commission... can disregard impending plans for further power development... [W]e cannot tolerate the Commission cutting back on its expanded responsibility by blinding itself to potential developments notwithstanding its lack of authority to compel future, alternate construction." (Greene County I, 455 F. 2d at 424).

* One of the myths created by the FPC and PASNY about this case was that it was full of Intervenor caused delays. The truth is that up until Greene County I the only delays in this case were (1) a one month delay requested by PASNY on July 21, 1971 (R. 5927), (2) a one month delay requested by the FPC Staff on September 14, 1971 (motion and order omitted from Record filed by FPC), (3) a one month delay requested by an intervenor on December 12, 1971 because of a death and (4) a two week adjournment requested by Judge Levy on December 17, 1971 because of a death. It is clear that any delays were not the fault of intervenors. Judge Levy also criticized Greene County's attorneys for periodically reporting to their client with respect to the status of this case, their tactical options and the probabilities of success, claiming that this was calculated to delay. (See p. 29 of the Initial Decision, R. 7074, A. 29).

(2) On the compliance with NEPA issue this Court held

"[W]e conclude that the Commission was in violation of NEPA by conducting hearings prior to the preparation by its staff of its own impact statement..." (Greene County I, 455 F. 2d at 422)

This Court directed the FPC staff to prepare a detailed statement under NEPA, make it subject to the "full scrutiny of the hearing process", and provide intervenors "The opportunity to cross examine both PASNY and Commission witnesses in light of the Statement" (Greene County I, 455 F. 2d at 422).

(3) Finally, as discussed above (p. 9), this Court in Greene County I castigated the FPC for its "encrusted, entrenched positions" (455 F. 2d at 417, footnote 12) which procedurally threatened the due process to which intervenors were entitled.

In short, Greene County I was an unequivocal decision that the FPC had been fundamentally and continually wrong in its interpretations of the Federal Power Act and NEPA at almost every turn in this case. It represented a clear mandate to the FPC to go back to the drawing board and try again.

Greene County's Worst Fears Gain Credibility

Between the prehearing conference in June 1971 and the issuance of the FPC Draft Environmental Statement in January, 1973, the full scope of PASNY's plan began to emerge.

The plan was as follows: Once the FPC approved a right of way for the Gilboa Leeds line, it would be used as a beachhead for the larger operation. The design was similar to a dumbbell laid from Gilboa to Leeds. The handle of the dumbbell would be the

Gilboa Leeds right of way to be crammed with two (Tr. 7), and possibly three (Tr 208, 1776) transmission lines on a proposed 400 foot wide right of way (Tr. 2377) marching through Greene County with two rows of metal towers -- some as tall as a twelve story building -- spaced every 1000 feet or so for approximately 36 miles. Eighteen or more strands of heavy cable would sweep from tower to tower.

At the western end new Gilboa would be a complex of PASNY power facilities; (a) the 1,000,000 kw Blenheim Gilboa Project already licensed by the FPC, (b) one (the Breakabeen Project) or possibly two (Tr. 1041-1042) additional 1,000,000 kw pumped storage projects requiring FPC licenses*, and, (c) a major electric transmission substation radiating power lines in all directions and being the major way station for electric power going over PASNY lines from Canada (the international connection requiring FPC approval) to New York City (See Greene County III).

* PASNY has admitted that if the Gilboa Leeds line is built, its existence will be a strong justification for constructing additional generating facilities near Gilboa:

"One of the several elements...which in the judgment of the Authority makes Breakabeen the best location for its next pumped storage plant is the fact that [the Gilboa Leeds line] could be used to transport Breakabeen power and Blenheim Gilboa power in common and thus a minimal amount of transmission facilities (including a second circuit to Leeds) will be required if the Breakabeen Project is built". (Applicant's Answer to Intervenor's "Motion to Consolidate and for a comprehensive Impact Statement" dated September 13, 1973, p 12). (R. 6938)

The other ball of the dumbbell would be in the vicinity of Leeds in Greene County close to the Hudson River where a major regional transmission substation was already under construction. There would be built a PASNY complex of steam generating power plants -- some coal powered and some (requiring Federal approval) nuclear fueled (R. 6521-6526). From this complex, additional massive transmission facilities would go, not only to Gilboa so that the steam generated power could be used in slack periods for pumping energy to drive the pumped storage complex, but also south to New York City.* (Tr. 996, 1907)

Just as Belgium historically has been the land through which the others of Europe marched to war, Greene County, it seemed, was about to be reduced to a corridor and a battlefield. The Gilboa Leeds line was only the beginning, and a crucial one.

The Gilboa Leeds line, opening up a critical right of way through virgin territory, was clearly one of the initial and key segments in an integrated, comprehensive, long range program of massive power plants and extra high voltage transmission facilities. As such, it represented a significant step toward a major commitment to a particular configuration and type of transmission facilities in the northern Catskill region and elsewhere in New York State, to the pumped storage mode of electric generation, and to the future siting of base load and peaking generating capacity. It was clear that approval or disapproval of the Gilboa Leeds line would have a profound impact on future regional electric power planning and, consequently, on regional land use and environmental quality.

* See the maps in the annex to this brief.

Fortunately, thought Greene County, many large segments of the overall plan required FPC licenses, others required other Federal approvals, and under the Federal Power Act and NEPA the cumulative, long range impact of PASNY's designs on Greene County would be subject to a complete, independent review.*

Having established in Greene County I that this was so, Greene County waited for the FPC Staff Draft Environmental statement.

The FPC Staff Releases A Deficient Draft Environmental Statement

In January 1973, the FPC, in purported compliance with Greene County I, released its Draft Environmental Statement ("DES") for the Gilboa Leeds Line (R. 6253-6435). This, as discussed in Judge Mansfield's dissent in Greene County II, was a fundamentally bankrupt document.**

The opinion that the DES was completely deficient was shared, not only by intervenors and by Judge Mansfield, but also by the Federal and State agencies primarily concerned with environmental protection. In fact, the Federal Environmental Protection

*Greene County is mindful of Chief Judge Kaufman's comments (Greene County I 455 F.2d at 423, footnote 27). Fortuitously, in this case, there were sufficient applications by PASNY already under consideration by the FPC to permit the FPC in the particular circumstances of this situation to overcome the problem of "fragmented government regulation of power development" noted by Judge Kaufman.

**Greene County II held that it was then premature to come to this court for relief, expressly saving for the instant case the issues there raised:

"Nothing contained herein is to be regarded as dealing with the merits of such issues as may come before the court on appeal from a final order."
(Greene County II, 490 F.2d at 258)

Agency ("EPA") and the New York State Department of Environmental Conservation ("DEC") both agreed that the DES was so bad it could not even be commented upon.*

Thus, by letter dated March 16, 1973, EPA recommended that the staff environmental statement be "reissued in draft form for review". (See page 263 of the FES, R. 4828). EPA rated the instant draft "Class (3)" under its code system for commenting on the adequacy of the statements EPA reviews. A class (3) rating means the statement is inadequate because:

"EPA believes that the draft impact statement does not adequately assess the environmental impact of the proposed project or action, or that the statement inadequately analyzes reasonably available alternatives. The Agency has requested more information and analysis concerning the potential environmental hazards and has asked that substantial revision be made to the impact statement.

"If a draft impact statement is assigned a Category 3, no rating will be made of the project or action, since a basis does not generally exist on which to make such determination." (Official EPA Definition of Codes for the General Nature of EPA Comments.)

Accordingly, EPA, which is mandated by Section 309 of the Clean Air Act (42 USC §1857h-7) to comment on all NEPA statements, found that it could not rate or comment upon the proposed project.

Likewise, DEC concluded that the staff draft "is so entirely deficient" that it could not be commented upon. (R. 6675) DEC echoed and elaborated the inadequacies noted by EPA as follows:

"While it is our usual custom to provide specific and detailed comments, we feel at this time that the subject statement is so entirely deficient, that such reply would be comparable to entirely rewriting the Federal Power Commission's document."

* The EPA and DEC comments are set forth in an annex to this brief following p. 65.

"The Gilboa Leeds transmission line is a first step, and will be basic to a comprehensive regional power plan, therefore, consideration of this one statement alone and by itself is an injustice to the basic letter and spirit of intent of the National Environmental Policy Act and the...Planning Board versus FPC court decision."

Greene County was in general agreement with DEC and EPA with regard to the inadequacy of the DES and on April 3, 1973, in accordance with the FPC rules, submitted its own detailed statement of environmental position*.

In addition, Greene County made a formal motion asking for the FPC Staff to redo the DES (R. 6521-6526). This motion began the FPC's "procedural cat and mouse games" which culminated in this Court's decision in Greene County II.

The FPC Staff Tries to Prepare A Final Impact Statement

While the FPC was ignoring the motions concerning the deficient DES, the FPC Staff was working on a Final Environmental Statement ("FES"). This document was published in May 1973 and became Exhibit 71 in the hearings.

*One of the other persistent myths of this case, dwelt upon at some length in both Judge Levy's Initial Decision and FPC Opinion 751, is that Greene County allegedly "refused to file" comments on the DES. The repetition of this myth only underscores Judge Levy's and the FPC's blind ignorance of anything in the Record contrary to their preconceived notions about this case. Greene County's comments on the DES were indeed filed; they were filed timely; and they were reproduced, at pp 323-332 in the Staff FES (R. 4888-4897). The same bias appears when Judge Levy castigates Greene County at page 27 of the Internal Decision because of its comments as to the inadequacy of the DES agreed with those of DEC and EPA (although Judge Levy carefully omits mention of the DEC and EPA comments) (R. 7072 A. 27).

While longer in pages, in substance the FES was in many ways worse than the DES. As Judge Mansfield in Dissent in Greene County II commented:

"That the FPC has failed to prepare the comprehensive impact statement specified by this Court is clear. That the FPC may have cured such deficiencies in its final impact statement seems to me to be without support in the record." (Greene County II, 490 F.2d at 261).

When the FES was published, it completely ignored DEC's comments and omitted them from the Appendix to the FES which purportedly contained copies of all comments on the DES.

EPA's comments were included in the FES Appendix. Also included in the FES was a subsequent letter from EPA to PASNY which appeared, when read alone, to modify EPA's position. But not included in the FES was the final EPA letter to the FPC which stated:

"Our comments on (the DES) have not been withdrawn and remain for the consideration of the Federal Power Commission." (R. 6751)

Notwithstanding the failure to circulate a DES capable of being commented upon, the attempt to hide the DEC and EPA comments, and the patent inadequacy of the FES, the FPC pushed on with the hearings.

The Hearing Resumes

The hearing before Judge Levy resumed in Washington on July 2, 1973 (1) without there being any adequate prehearing discovery (Tr. 2121-2141) and (2) with the Greene County II issues unresolved. Needless to say, the parties had a sense of deja vu

(See p. 11 above and Greene County II, 490 F.2d at 259, footnote 2.)

The hearing continued throughout the summer and into the fall of 1973 with the last hearing day being September 5, 1973. Greene County II was decided by this Court on December 27, 1973.

At the hearings from 1971 to 1973 numerous witnesses were heard on behalf of a variety of parties. The following discussion will briefly identify the witnesses.

PASNY's Evidence Comes Almost Exclusively from Engineers

As witnesses PASNY presented a civil engineer (Francis M. Fullerton), a bunch of electrical engineers (George C. Loehr, John Boston, E. Barret Shew and Eric T. B. Gross), a surveyor (Robert Graves), a photographer (Harold E. Johnson) and a geologist (Charles P. Benzinger). The lawyer (Scott Lilly) and the engineer (Belmonte Cocolo) who prepared PASNY's Environmental Report (R. 4269-4324) were not produced. (Tr. 529, 1550)* nor did PASNY produce any witnesses with aesthetic, ecological or environmental planning expertise.

Not only were there no PASNY witnesses available to sponsor PASNY's Environmental Report**, or to be cross examined "in light of the (environmental) statement" as directed by this court in

*Witnesses Johnson (Tr.502), Graves (Tr. 528), Benzinger (Tr. 576), Shew (Tr. 611-612) and Gross (Tr. 826), all expressly disclaimed having anything to do with PASNY's Environmental Report.

** Even though Judge Levy had previously ruled that an exhibit (expecially PASNY's Environmental Report) could not be admitted into evidence without a witness to sponsor it, (Tr. 46-47) PASNY's Environmental Report was later admitted into evidence on a sudden whim of Judge Levy (Tr. 2256). As such it escaped cross examination.

Greene County I, but Judge Levy also narrowly circumscribed discovery and cross examination of PASNY concerning environmental issues. Thus when engineering witness Fullerton, the only witness presented by PASNY who would claim any responsibility for PASNY's Environmental Report (Tr. 1517), testified, Judge Levy denied all discovery requests as to how the report was put together and by whom (Tr. 1526) and cut off all cross examination on visual impact. (Tr. 1546-1547, 1578)

Then at the prehearing conference that preceded the resumption of hearings following Greene County I, Judge Levy falsely asserted that:

"we had completed cross-examination a year ago on the applicant's environmental statement". (Tr. 2131)

and that

"we had a full dress hearing on that report" (Tr. 2130)

Unfortunately, no such hearing ever occurred, PASNY presented no environmental witnesses, and there was no meaningful cross examination of PASNY on the environmental issues in the case.

PASNY's presentation was purely and simply an engineer's day.

The FPC Also Looks Primarily To An Electrical Engineer

The FPC staff's principal witness was an elderly electrical engineer, Dr. Jessel, who retired in the middle of the hearings. He was also the author of most of the FES. (See footnote on p.53 infra). As its chief environmental witness on this overland transmission line, the FPC staff presented Forrest Hauck, a fisheries biologist. In addition, the FPC staff presented a few other ex-

perts to be cross examined concerning the FES, but it appeared that they were presented only for eyewash and had little, if anything, to do with the FES or with this case.

Thus, the FPC's landscape architect (Mr. Browder) on cross examination admitted that his participation was limited to reviewing one proposed routing and nothing else (Tr. 2557, 2581 and 2582). The FPC's forester (Mr. Paquin) admitted that he contributed only a little more than two thirds of a page to the FES (Tr. 2550), and had a scant familiarity with the project site (Tr. 2591). The FPC's geologist (Mr. Sargent) had no real part in this case and was not even cross examined (Tr. 2224). The FPC's wildlife biologist (Mr. Roseberry) had a larger role in the FES but his expertise hardly fit the environmental problems posed by this case. Thus, when the wildlife biologist was opining on history and culture (Tr. 2613, 2637-2638) it was pretty clear that the FPC Staff did not regard the presentation of environmental evidence to be a serious part of its job.

The FPC staff relied principally, as did PASNY, on electrical engineering evidence in compiling the Record in this case. As discussed at some length below (p. 57-60), even this engineering evidence was deficient as failing to reflect any independent FPC data gathering or analysis. To some extent Judge Levy sought to protect Staff witnesses and cover up their insufficiencies.*

*At one point Judge Levy went so far as to bolster a faltering Dr. Jessel

"If you don't have the necessary data,
and have not made the necessary studies,
it is no reflection on your competence...(Tr. 1726)

The most egregious instance of Judge Levy's frustration of Greene County's rights, either through discovery or cross examination, to uncover the facts of this case occurred in response to Greene County's efforts to obtain for the Record the basic Staff engineering work which apparently led to the FPC's 1969 conclusion that the Gilboa Leeds line was an integral part of the Blenheim Gilboa project. During the cross examination of Dr. Jessell, the witness referred to the existence of these Staff engineering reports, which appeared to be the basic data on the justification for the Gilboa Leeds lines (Tr. 1785-1786). Since Judge Levy had repeatedly ruled that the only permissible time for discovery was in the midst of cross examination (see e.g. Tr. 724), Intervenors immediately requested a copy of these reports (Tr. 1786). Promptly shifting his ground, the Judge ruled that such a request could only be properly made in writing and not during the hearing (Tr. 1787).

The motion was duly made in writing (R. 6924), but Judge Levy ignored it until it was expressly called to his attention during a subsequent hearing session (Tr. 3694). Even then he refused to rule on it, twisting and turning to obstruct discovery (Tr. 3695-3696). He then asked Staff for a list of items which would be covered by the request (Tr. 3696) and announced that he was going to Washington to "study the record" (Tr. 3697).

When the hearing resumed, no list was forthcoming and no ruling was made. Intervenors reminded the Judge once again of the pending request (Tr. 3878). Staff announced that it

"treated it in a bit of a perfunctory fashion" (Tr. 3878)

and

"made no search as to whether any studies were made." (Tr. 3880)

Instead of disciplining Staff for failing to comply with his order for a search set forth at Tr. 3696 or ordering an immediate search, Judge Levy proceeded as follows:

"PRESIDING JUDGE: Now as I understand it, Mr. Lane has indicated that to the best of his knowledge, as of this moment he has no specific reports and studies to make available to you.

"MR. NEEDLEMAN: He has said he has not had time to make a search.

"PRESIDING JUDGE: Without you or I trying to characterize what Mr. Lane said, the essential fact as far as I am concerned is that he has no specific report available to turn over to you.

* * *

Under those circumstances I have no alternative, it seems to me, except to deny the request..." (Tr. 3882)

Consequently, by virtue of this incredible ruling, the FPC Staff's engineering reports as to the alleged need for the Gilboa Leeds line to serve the Blenheim Gilboa Project are not even in the record of this case.

The Meaningful Environmental Evidence Comes From Intervenors

Intervenors presented a series of distinguished experts on the visual and environmental impacts of the route preferred by PASNY and the FPC staff going through the historic and scenic Durham Valley.*

*As noted below, this route was correctly rejected by both Judge Levy and the FPC.

In addition, Greene County, short of funds, fought to present its direct case, dealing with broader issues, through expert witnesses employed by other New York State Agencies. It was successful in reaching an agreement pursuant to which two such witnesses were produced. Here, once again, playing by his own peculiar set of rules, Judge Levy covered up the evidence the most important of these witnesses had to offer.

As its principal witness, Greene County called Frank Burgraff, Chief of the Transmission Facilities Certification and Planning Office of the Office of Environmental Planning of the New York State Public Service Commission (PSC) (Tr. 3527). Mr. Burgraff was the only witness called by any party who was an expert on the environmental aspects of transmission line planning.

Mr. Burgraff appeared with his counsel, Mr. Rheingold, attorney for the PSC, who stated the following ground rules for Mr. Burgraff's testimony:

"(w)e will agree to have Mr. Burgraff answer all reasonable questions re-
lating to his area of expertise and
his factual knowledge." (Emphasis supplied) (Tr. 3527).

The PSC had originally objected to Mr. Burgraff being called, but after Staff conferred with the PSC (see Tr. 3547), the PSC and Staff agreed as follows:

"The State of New York has offered this witness as an expert and they wish him to give his opinions and cognate..." (emphasis supplied) (Tr. 3547)

However, Judge Levy ruled that Mr. Burgraff could not be qualified as an expert and that inserting his qualifications as an

expert "is not for the purpose of qualifying the witness, but is merely informational" (Tr. 3528).

After so limiting the use of the witness, Judge Levy prevented Mr. Burgraff from testifying about the very thing he knows the most about: the comparative environmental impacts of alternative routes (Tr. 3561-3563).^{*} Mr. Burgraff's own counsel had no objection (Tr. 3562), but the Judge announced:

"He's not appearing here as your expert witness to give opinion testimony: (Tr.3563)

Of course, Mr. Burgraff was called as an expert witness by Greene County and was so called under an agreement between the PSC and Staff that Mr. Burgraff would be permitted to assist the Record in this case with his expertise. Judge Levy completely frustrated Greene County in this regard. He thus effectively excluded Greene County's direct case^{**} on comparative environmental impact and deprived the Record of the best evidence on this critical point.

^{*}Judge Levy even went so far as to prevent Greene County's counsel from making an offer of proof stating: "You have your offer of proof on the -- every adverse ruling I make." (Tr. 3559). Incredibly, Judge Levy seemed not to know what an offer of proof was. He made the same error at Tr. 825.

^{**}As a rebuttal witness at the end of the hearing, Greene County presented the Greene County Planning Director, Waring Blackburn. Although Greene County's entire case, of necessity, was a rebuttal case (Tr. 3390), and even though Judge Levy early announced

"(W)e will fix a time for filing rebuttal testimony..." (Tr. 1941-42)

and expressly ruled that the dates for filing direct testimony did not relate to rebuttal testimony, another myth of this case is that by waiting until the end of the hearing to call Mr. Blackburn, Greene County upset the orderly progress of the hearing by ignoring directions timely to file its direct case, (See pp. 19-20 of opinion 751 (R. 7316-7317, A. 83-84)). This is false. The only time Greene County refused to file anything was when Judge Levy in January 1972 tried to continue the hearing in clear violation of Greene County I without an FPC staff environmental statement. (Tr. 1864-1867).

Judge Levy Approves the Line

On July 1, 1974 Judge Levy issued his Initial Decision (R. 7045-7106, A. 1-63) recommending approval of the Gilboa Leeds line on Route B-1 on a 250 foot right of way

"capable of carrying two 345 kv circuits convertible to one 765 kv circuit" (R. 7051, A. 6)

"so as to be able to carry far larger quantities of power than that generated or required solely by the B-G project" (R. 7051, A. 6)

This capacity was recommended by Judge Levy to serve (a) the Blenheim Gilboa Project, (b) the additional pumped storage project PASNY planned for the Schoharie Creek at the Gilboa end of the line (the Breakabeen Project), and (c) nuclear fueled generation planned by PASNY at the Leeds end of the line, and (d) a statewide 765 kv transmission network "capable of transmitting four to six times more power than a 345 kv..."(R. 7051, A.6). Judge Levy made no mention of the fact that the FPC license was based upon the representation that the Blenheim Gilboa project was to be PASNY's only hydro project on the Schoharie Creek. Nor did Judge Levy consider how the breach of this representation affected the FPC's comprehensive plan for use of the Schoharie Creek waterway which contemplated only one such project.

1. Need for the Line

Overlooking the fact that the Blenheim Gilboa Project was proposed and licensed to serve upstate New York, Judge Levy said that the Gilboa Leeds line was needed

"because it is the shortest route from the project to the New York City area" (R. 7054, A. 9).

The Initial Decision reiterates at some length this assumed New York City need. While mentioning the fact that the transmission system south of Leeds had a bottleneck which prevented power from getting to New York City along this route without construction of other additional facilities, nevertheless Judge Levy, in a non sequitor said:

"The Leeds line is needed now to transmit power from the Project to New York City area via Pleasant Valley on a day-to-day basis" (R. 7056, A.11).

Finally, Judge Levy in a terse paragraph contended that the Gilboa Leeds line is needed for the "stability" of the Blenheim Gilboa Project and the transmission system (R. 7056-7057, A. 11-12). Unfortunately Judge Levy does not review the evidence on this point even though the stability role of the Gilboa Leeds line was PASNY's principal point in favor of the line's need. As will be discussed below, the stability point is one that turns on projections of electric power loads, the existence or nonexistence of power plants and transmission lines planned in other places in New York State and a variety of additional factors (See Tr 1698-1701).

Judge Levy's Initial Decision, however, treats stability as an absolute rather than a relative quantity, like pregnancy-- either you are or you aren't, period! The world of bulk electric power transmission, however, is not so tidy.

2. Route A Is Rejected

After dealing with the "need" issue, Judge Levy went on to discuss a number of design and location issues such as right of way widths and tower types (R. 7059-7066, A.14-21). The most significant part of this discussion was his recommendation as to route. Relying almost exclusively on witnesses produced by intervenors, Judge Levy rejected the route preferred by both PASNY and the FPC staff running through the scenic and historic Durham Valley (Route A) and approved Route B-1.

3. NEPA Compliance is Found

Then, Judge Levy moved on to discuss NEPA compliance (R. 7066, A. 21). Here, completely ignoring the comments of DEC and EPA and citing Greene County II for the proposition that the DES and FES were adequate (R. 7072, A. 27) (although this Court expressly reserved decision on that issue to this time), Judge Levy found the DES and FES to be adequate.

4. The Hearing Was Held to be Fair

Finally, overlooking the comments of Judge Kaufman and Judge Mansfield concerning the insufficiency of FPC procedures, Judge Levy declared that he had conducted a perfectly fair hearing. In his view, most of the problems in the hearing were caused by Greene County and the other intervenors (R. 7074-7077, A. 29-31).

The Long Delay Before the FPC Acts

Exceptions to Judge Levy's Initial Decision were taken by many of the intervenors and briefing on the exceptions was completed during September 1974. However, the FPC did not rule on the exceptions until January 29, 1976.

During that gap much of the electrical engineering data which was in the record (which itself was closed on September 9, 1973) and which was the sole support for the need for the Gilboa Leeds line had been found to be erroneous by subsequent reports and studies -- some by the electric companies and PASNY, some by the FPC's Bureau of Power and some by the New York State Public Service Commission.

Especially noteworthy were:

- (1) Reports on the operating history of the Blenheim Gilboa Project showing that the Project and statewide transmission system were both reliable and stable without the Gilboa Leeds line; and
- (2) Reports on New York State population trends* and electric power usage** showing the load flow and stability studies in the Record of this case to be based on false premises.

* The U. S. Census Bureau provisional July 1, 1975 population estimate for New York State indicated an unprecedented decline of 140,000 persons since 1970. Population estimates are a key part of load flow and stability studies (Tr. 1698).

** The primary source materials on electric load usage are annual reports filed by the electric utilities and PASNY annually with the New York State Public Service Commission under §149-b of the N.Y.S. Public Service Law and with the Federal Power Commission.

The FPC Closes Its Eyes and Acts

Finally, some 28 months after the Record was closed, the FPC acted by issuing Opinion No. 751 (R. 7297-7332, A. 64-97) affirming and adopting Judge Levy's Initial Decision.

Opinion No. 751 concedes that

"...the Blenheim Gilboa Pumped Storage Project has been completed and can be operated at maximum head with the existing Gilboa-New Scotland line to the north-east and Gilboa-Fraser line to the south-west..." (R. 7302, A. 69)

However, without referring to any of the specific evidence on electric load flows in New York State, or to the other publicly available reports which indicated that this evidence was erroneous, the FPC agreed with Judge Levy that the Gilboa Leeds line was needed to carry power to New York City and for "reliability and stability" purposes.

The principal discussion in Opinion 751 related to the relationship between the proposed Gilboa Leeds line and other electrical facilities proposed by PASNY and in some instances subject to FPC licensing authority. While admitting that the Gilboa Leeds line is a part of a long range comprehensive plan that includes (a) "the New York 345 kv grid" (R. 7305, A. 72), (b) "a New York Power Pool Plan for a 765 kv transmission system" (R. 7306, A.73), (c) "a pumped storage project on Schoharie Creek about six miles north and downstream from the Blenheim Gilboa Project" (R. 7307, A.74) and (d) "base load plants in the vicinity of Leeds" (R. 7308, A.73), the FPC declined to take any more than a cursory look at these plans before concluding:

"Our purpose is to approve a primary line for the Gilboa-Blenheim (sic) Project so that under Section 10(a) of the Federal Power Act the project will be best adapted to a comprehensive plan for improving or developing a waterway for the benefit of interstate commerce." (R. 7305, A. 72)

The fact that the Blenheim Gilboa Project itself had been licensed by the FPC as adapted to such a plan on the express representations that no further plants were to be built on the Schoharie Creek and to serve upstate New York needs and that these representations were now false completely escaped the FPC's notice in Opinion 751.*

Extraordinarily, the primary thrust of the FPC's argument was that to do an adequate job of reviewing electrical system planning and system alternatives

"...would prevent the building of the Gilboa Leeds line for years..."
(R. 7308, A. 75)

and that this "would be contrary to the public interest." (id.)** It is with some irony that we note that Greene County first asked for this job to be done on June 22, 1971 and this Court first asked for this job to be done on January 17, 1972 in Greene County I (455 F.2d at 423-424). Now having let five years go by without

*Section 9(a) of the Federal Power Act (16 USC §802(a)) prohibits changes in information set forth in approved license applications "until such changes have been approved and made a part of such license by the commission." The detailed procedure for making such changes is set forth at 18 CFR Part 5. This procedure was never followed and the changes were completely ignored by the FPC and never Approved.

**The FPC grossly misrepresents Greene County's argument by claiming that Greene County wanted the FPC to "review precisely what other 345 kv lines may be built" (R. 7305, A.72) and to "wait until some indefinite period in the future when the plans for the grid have become entirely firm." (R. 7306, A.73) To the contrary, the programmatic review and evaluation must occur before any plans are firm (see Tr 3590) if the FPC, under the Federal Power Act and NEPA, is to exercise any meaningful independent role. It is exactly this responsibility the FPC is abdicating in this case.

having done the job, the FPC declined to do the job by saying that it will take too long.

After rehearings were denied (R. 7347-7355, A.110-117), Greene County sought review in this Court.

I
THE FPC ERRED IN THE
MANNER IN WHICH IT CONSIDERED
THE NEED FOR THE GILBOA
LEEDS LINE AND IN ITS
CONCLUSIONS WITH RESPECT
TO SUCH NEED

The need for the Gilboa Leeds line cannot be based solely upon its use for "transmitting power (from the Blenheim Gilboa Project) to the point of junction...with the interconnected primary transmission system" (see 16 USC §796 (11)) since this is already done by the New Scotland and Fraser lines, each of which alone are sufficient for this purpose. Indeed neither PASNY nor the FPC seek to justify the need for the line on this basis.

It is perfectly clear, and apparently conceded by all, that the only possible justification for the line is an integral and inseparable part of a larger comprehensive plan of interrelated electric power facilities in which this line's primary function would be for the overall system. Therefore, Greene County's points as to the "need" issue in this case are three:

A. The FPC violated the Federal Power Act, NEPA and the mandate of this Court in Greene County I by failing to evaluate comprehensively the several concurrently pending proposals for FPC action (and other Federal actions) which will have cumulative impact on Greene County and its region. In short, the FPC focused on too narrow a project scope and fell into the error of segmentation much like the defendants in Chelsea Neighborhood Associations v. U. S. Postal Service, 516 F.2d 378 (2d Cir. 1975) and NRDC v. Callaway, 524 F.2d 79 (2d Cir. 1975)

See also NRDC v. NRC F.2d 6 ELR 20513 (2d Cir. 1976)
(Nos. 75-4276, 75-4278)

B. The FPC violated both the Federal Power Act and NEPA by failing to consider modal or programmatic alternatives to the Gilboa Leeds line in view of the fact that its primary function would be for the overall system. In this respect, the FPC's error resembles the error of the Federal defendants in NRDC v. Morton, 458 F.2d 827 (D.C. Cir. 1972)

C. The data relating to electric power usage in New York State on which the FPC relied as to systems needs (and which this Court in Greene County I ordered the FPC to consider) is erroneous according to highly credible material from expert sources. Further, the material revealing the errors is not in the Record and the FPC refused to consider it when it came into existence after the Record was closed. This is the same error which the FPC made in Hudson River Fisherman's Association v. FPC, 498 F.2d 827 (2d Cir. 1974).

A. The FPC failed to make a Comprehensive Review of the Proposed Interrelated Facilities of which the Gilboa Leeds line was to be a Part

Although under the Federal Power Act, the FPC can only act on applications before it, its comprehensive planning responsibilities require it, in passing on applications, to consider them in the context of any multi-phased, integrated plan as to which the facility applied for may be a part. State of California v. F.P.C., 345 F.2d 917 (9th Cir. 1965) cert. den. 384 U.S. 941 (1966); City of Pittsburgh v. F.P.C., 237 F.2d 741 (D.C. Cir. 1956).

Thus, even though the FPC may not approve or disapprove facilities for which no application to it has been made, it can, and must, in the exercise of its licensing powers on applications before it, through disapprovals or the attaching of conditions to approvals, see that its licensees and applicants proceed in an orderly fashion consistent with intelligent long range planning and not in a segmented ad,hoc manner. City of Pittsburgh v. F.P. C., supra.

Likewise, NEPA directs the FPC to

"recognize the ... long range character of environmental problems..." 42 USC §4332(2) (E)

and the Council on Environmental Quality tells the FPC to act

"with a view to the overall, cumulative impact of the action proposed, related Federal actions and projects in the area and further actions contemplated."
40 CFR §1500.b(a)

The FPC's own NEPA regulations require an environmental statement to

"specifically discuss plans for future development related to the application under consideration."
18 CFR §2.80 (b)

And in its last term the United States Supreme Court pointed out that NEPA

"may require a comprehensive impact statement in certain situations where several proposed actions are pending at the same time...By requiring an impact statement Congress intended to assure such consideration during the development of a proposal or -- as in this case--during the formulation of a position on a proposal submitted by private parties. A comprehensive impact statement may be necessary in some cases for an agency to meet this duty. Thus, when several proposals for related actions that will have cumulative or synergistic environmental

impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together. Only through comprehensive consideration of pending proposals can the agency evaluate different courses of action." Kleppe v. Sierra Club
U.S. , 49 L. Ed. 2d 576, 590 (1976)
(comprehensive impact statement not required where regional environmental interrelationships are not clearly tied to pending proposals for Federal action).

In this case, not only is there an acknowledged overall plan, but also key elements of the plan were contained in pending proposals by PASNY before the FPC:

- (a) the Gilboa Leeds line;
- (b) the proposed second pumped storage plant (the Breakabeen Project) at the Gilboa end of the line (FPC Project No. 2729);
- (c) the initial segment of the 765 kv line to run from Canada to New York City using the Gilboa Leeds line right of way and towers (FPC Docket No. E-8414; See Greene County III).*

What's more, the Blenheim Gilboa Project and the New Scotland and Fraser lines have already received FPC licenses without environ-

* Also pending before another Federal agency (the Nuclear Regulatory Commission) is a PASNY proposal for a 1,200,000 kw power plant at the Leeds end of the Gilboa Leeds line (NRC 50-549). Other PASNY proposals for connected or closely related power plants and power lines are pending before State agencies. Finally, as soon as another transmission line is built to Leeds, a line will have to be built from Leeds to Pleasant Valley (Tr. 3155-3156). See also Tr. 1907, 1921. The possibility of multi agency involvement in programs has been provided for under NEPA through the "lead agency" concept (See 40 CFR §1500.7(b)) and under Federal Power Act §§4(c) and 209(b) (16 USC §§797(c) and 824h(b)).

mental statements either on any one of them or all of them considered as a whole. The U.S. Supreme Court has pointed out that even where one segment of a program has been approved, the relevant agency should

"then take into consideration the environmental effects of that existing project when preparing the comprehensive statement on the cumulative impact of the remaining proposals" (Kleppe v. Sierra Club, supra 49 L. Ed. 2d at 593, footnote 26).

Obviously, the FPC need not review the past and future history of the whole universe in connection with every application, but it must make a reasonable definition of project scope which permits it to assess intelligently the application before it in context.

The 1968 application for the Blenheim Gilboa Project represented an especially convenient point for the FPC under the Federal Power Act to make a complete review of PASNY's pumped storage hydroelectric generation plans in New York State (See Ch. 294 Laws of 1968 of N.Y.) together with related plans for the construction of new generation sources for pumping power and high voltage transmission. However, as pointed out by this Court in Greene County I, the FPC violated applicable law and did not make such a review in connection with the power plant and the first two transmission lines of the Blenheim Gilboa Project. Nevertheless, since construction was far along the Court did not disturb those facilities but ordered the FPC to do better in the future. But the FPC has not done better:

(a) it refused to prepare a comprehensive impact statement in this case when asked to do so (R. 6521-6526, 6536-6542, 6589-6593, 6742-6752);

(b) it approved the Gilboa Leeds line allegedly to carry power to New York City from the Blenheim Gilboa Project and the second proposed power plant on the Schoharie Creek without in any way reconsidering that the Blenheim Gilboa Project itself was approved as part of a comprehensive plan that called for no further power plants on the Schoharie Creek and the use of Blenheim Gilboa Power upstate only;* and

(c) the environmental statements which it did prepare admitted the existence of the overall plan but declined to evaluate the plan environmentally or in any other way. Indeed, the overall plan was treated by the FPC as a "given" and a major justification or "selling point" for the Gilboa Leeds line.

This narrowness of vision was precisely what both EPA and DEC found to taint the FPC's analysis to the point where it was meaningless**. It also was what Chief Judge Kaufman was concerned

* Compounding the problem is the fact that when the FPC licensed the New Scotland and Fraser Lines on a 150 foot right of way, PASNY actually acquired a 400 foot right of way in violation of its license, keeping 250 feet in reserve for future lines. The FPC never reconsidered how this changed the plan it apparently approved on April 10, 1970 calling only for a single circuit 345 kv line on each of the New Scotland and Fraser rights of way. (The FPC Staff did not even inquire as to why PASNY took 400 feet when only 150 feet were licensed (Tr. 1645)). The last confusing piece of this puzzle occurred when, during the administrative proceedings on the Gilboa Leeds line, PASNY's trustees authorized another transmission right of way parallel, but not adjacent to the Gilboa Leeds line (R. 4229-4268). Nobody knows what this is for or how it fits into the plan.

** The Department of Housing and Urban Development (FES, p 269 and the Department of the Interior (FES, p. 271) also appeared to agree that the project scope was too narrow, with the Dept. of Interior expressly stating that as to the new related generating capacity there should be included "an assessment of the environmental effects which will arise."

about in Greene County I, what Judge Mansfield dissenting in Greene County II believed was such an obvious error that it should not be put off for future correction, and what Judge Oakes found to be the basis of Greene County's standing in Greene County III.

Of course the Greene County cases are not the only ones in which this Court has found segmentation of a multi-stage proposal for Federal action to be improper. In Chelsea Neighborhood Associations v. U.S. Postal Service, supra, the U.S. Postal Service proposed to build a garage. New York City was to build housing above it. The Postal Service's environmental impact statements mentioned the housing, used it as a "selling point" for the garage, but failed to assess the costs and benefits of the housing. The Postal Service argued, as the FPC argues here, that (a) the housing plan was speculative, (b) to assess the housing would delay the garage indefinitely and (c) review and approval of the housing would be done at another time by someone else.

This Court held the Postal Service's environmental impact statements to be inadequate:

"If the potential impact of the housing is not considered before the [garage] is constructed, it will be too late to reassess the project as a whole no matter what is shown by a later EIS for the housing prepared by another agency. 'The statutory mandate is not fulfilled by vague generalities or pious and self-serving resolutions or by assuming that someone else will take care of it.' [citation omitted]. Moreover, using the housing as a 'selling point' without disclosing its possible negative aspects is certainly not the environmental full disclosure called for by NEPA." (Id. at 388)

Similarly, in NRDC v. Callaway, supra, this Court found the segmentation of Navy proposals to dump polluted spoil into Long Island Sound to violate NEPA. The lengthy discussion of segmentation in that case (524 F. 2d at 87 to 90) applies equally well to this case. There, the Navy limited its environmental impact statements to considering a single dumping program while ignoring several similar projects in the same vicinity. In justification, the Navy claimed that there would be no "bandwagon effect" of the single program, persons other than the Navy were planning the other projects,

the other projects were subject to subsequent review, if the cumulative impacts of all projects proved to be injurious they could be stopped at a later time, and to prepare a comprehensive environmental impact statement would be difficult and time consuming.

Nevertheless, this Court held:

"[A]n agency may not [treat] a project as an isolated 'single-shot' venture in the face of persuasive evidence that it is but one of several substantially similar operations, each of which will have the same polluting effect in the same area." (Id. 524 F. 2d at 88)

"The fact that another proposal has not yet been finally approved, adopted or funded does not foreclose it from consideration, since experience may demonstrate that its adoption and implementation is extremely likely." (Id at 88).

"The Navy's failure to consider [other proposals in the same area] is an example of the isolated decisionmaking sought to be eliminated by NEPA." (Id at 89).

The requirement of NEPA for a comprehensive impact statement in the circumstances of this case (See also NRDC v. NRC, supra; Scientists' Institute for Public Information Inc. v. AEC, 481 F.

2d 1079 (D.C. Cir. 1973); and Atchinson, Topeka and Santa Fe Railway Company v. Callaway, 382 F. Supp 610 (D.D.C. 1974)) dovetails with the abovementioned comprehensive planning responsibility of the FPC under the Federal Power Act.

That the FPC has failed to meet its obligations in this regard under both NEPA and the Federal Power Act cannot be denied.

B. The Consideration of Alternatives Was Erroneous

Just as the requirements of NEPA and the Federal Power Act came together on the matter of comprehensive analysis, so too do they meet on the requirement that the FPC consider alternatives.

In the first Scenic Hudson case the FPC itself noted:

"[W]e must compare the ...project with any alternatives that are available. If on this record [the applicant] has available an alternative source for meeting its power needs which is better adapted..., this application should be denied."

Then in reviewing the FPC's decision, this Court set aside that decision stating:

"It is our view, and we find that the Commission has failed to compile a record which is sufficient to support its decision. The Commission has ignored certain relevant factors and has failed to make a thorough study of possible alternatives..." (354 F. 2d at 612).

. . .

"There is no doubt that the Commission is under a statutory duty to give full consideration to alternative plans" [Emphasis supplied] (354 F. 2d at 617).

The underlying rationale of the requirement under the Federal Power Act that alternatives be considered was explained in City of

Pittsburgh v. F.P.C., supra as follows:

"The existence of a more desirable alternative is one of the factors which enters into a determination of whether a particular proposal would serve the public convenience and necessity."
237 F. 2d at 751, n. 28.

Those cases dealt with Federal Power Act obligations. The NEPA requirements have been explained by this Court as follows:

"Section 102(2)(C) of NEPA, 42 U.S.C. §4332(2)(C), specifically requires the inclusion in the EIS of a "detailed statement" of "alternatives to the proposed action", including an evaluation of the environmental consequences of the suggested alternatives, Natural Resources Defense Council, Inc. v. Morton, supra, 458 F. 2d at 834. The importance of this section of the EIS to the NEPA process has been stressed repeatedly by this and other federal courts, e.g., Monroe County Conservation Society, Inc. v. Volpe, 472 F. 2d 693, 697-98 (2d Cir. 1972); Calvert Cliffs' Coordinating Committee, Inc. v. AEC, 449 F. 2d 1109, 1114 (D.C. Cir. 1971); see CEQ Guidelines, 40 C.F.R. §1500.8(a)(4). It is absolutely essential to the NEPA process that the decisionmaker be provided with a detailed and careful analysis of the relative environmental merits and demerits of the proposed action and possible alternatives, a requirement that we have characterized as "the linchpin of the entire impact statement", Monroe County Conservation Society, Inc. v. Volpe, 472 F. 2d at 697-98. Indeed the development and discussion of a wide range of alternatives to any proposed federal action is so important that it is mandated by NEPA when any proposal "involves unresolved conflicts concerning alternative uses of available resources," 42 U.S.C. §4332(2)(D). This requirement is independent of and of wider scope than the duty to file the EIS, [citations omitted]." (NRDC v. Callaway, supra, 524 F. 2d at 92-93)

The consideration of alternatives by the FPC in this case is completely inadequate.

Thus, as early as June 28, 1971 (R. 5877-5839), the New York State Public Service Commission asked the FPC for a "broader regional study of potential corridors for transmitting this electric

power" and concluded "we believe that a further evaluation of alternative corridors is desirable prior to making a decision."

(R. 5833) No such study or evaluation ever occurred.

However, an even more serious error was made. As best as one can parse the reasoning of the Initial Decision and Opinion 751, the purpose of the Gilboa Leeds line is not to carry electricity from Gilboa to Leeds. Instead it is to strengthen upstate electric links to New York City and to provide an eventual corridor for 765 kv power from Canada. For example, Judge Levy states:

"The Leeds line, together with PASNY's New Scotland line will provide an essential third 345 kv circuit from Albany to Leeds" (Emphasis supplied) (R. 7055, A. 10)

For further example, PASNY's transmission planner Boston explained that because of weak connections southeast of Fraser, there would be problems with the "stability" of the Blenheim Gilboa Project without the Gilboa Leeds line (Tr. 2978-79)

Then, actual alternatives to the Gilboa Leeds line are not different routes between Gilboa and Leeds* (or different tower designs or transmission technologies on such route) but other methods of reinforcing the transmission system south of Albany or southeast of Fraser.**

* Note the absurdity of the FPC's alternative Route G which runs 194 miles from Gilboa to Fraser into the Lower Hudson Valley and then north to Leeds (Initial Decision p 44). If the idea is to get power to New York City, then alternative routes that sweep by New York City and then lurch scores of miles north to Leeds are absurd. This indicates that the FPC regarded consideration of alternatives to be a charade.

** The scope and range of alternatives to be considered depends upon "the primary purpose of the project." (Atchinson, Topeka and Santa Fe Railway Company v. Callaway, supra 382 F. Supp at 622). As discussed throughout this brief in considerable detail, while the Gilboa Leeds line will serve the Blenheim Gilboa Project, its main purpose is to serve a larger electrical system.

Greene County's principal witness, Mr. Burgraf of the PSC testified:

"...I don't think any study was seriously entertained as to the system alternative." (Tr. 3556).

No one contradicted this testimony and nowhere in the environmental statements or the Record does there appear any consideration of system alternatives*. (Compare this Court's summary of system alternatives in Scenic Hudson I, 354 F. 2d at 621-622).

Indeed, every single transmission alternative to the Gilboa Leeds line included either a Gilboa terminus, a Leeds terminus or both. Yet, it is conceded that to carry Blenheim Gilboa power to the interconnected system, either the New Scotland line or the Fraser line alone is sufficient. Therefore, Gilboa is not a necessary terminus for a transmission line to strengthen upstate-downstate ties (unless of course another power plant is to be built at Gilboa or 765 kv transmission is to be routed there from Canada via Utica in which case the logic of a Gilboa terminus requires a look at a bigger picture). Likewise, Leeds is neither a load center nor a source of generation. Therefore, Leeds as well is not a necessary terminus for a transmission link to strengthen upstate-downstate

* Curiously, in Greene County III PASNY represented to this Court that, at least as far as 765 kv transmission is concerned, a system alternative of strengthening transmission links between New Scotland (Albany) and Leeds directly was more logical than the Gilboa to Leeds line (528 F. 2d at 41, footnote 9) (See also Tr. 1103). Surely going directly from New Scotland (Albany) to Leeds makes more sense than Judge Levy's route from Albany to Gilboa to Leeds (Initial Decision p 10). This apparently could be done on an existing right of way by upping the voltage on some existing lines (Tr. 2022-2023). (This system alternative of upping voltage on existing lines was also mentioned by this Court in Scenic Hudson I, 354 F. 2d at 621-622).

ties (unless, again, some power plants are to be built at Leeds in which case the logic of a Leeds terminus requires a look at a bigger picture).

By restricting its analysis to transmission line alternatives terminating at either Gilboa or Leeds, the FPC failed to consider system or modal alternatives. This failure violated both NEPA and the Federal Power Act.

Thus in NRDC v. Morton, 458 F. 2d 827 (D.C. Cir. 1972) it was held:

"When the proposed action is an integral part of a coordinated plan to deal with a broad problem, the range of alternatives that must be evaluated is broadened." (458 F. 2d at 835).

In that case, an environmental impact statement concerning the sale of off-shore oil leases was held to be inadequate for not discussing broad modal alternatives to that action.

In Trinity Episcopal School Corp. v. Romney, 523 F. 2d 88 (2d Cir. 1975) this Court discussed at some length the required consideration of alternatives under NEPA. That case involved a proposed low income housing project. The only alternatives considered by the Federal defendants were siting alternatives. This Court held that to be an inadequate review of alternatives, the mandate of NEPA being

"to consider a variety of alternatives such as: ...alternatives requiring action of a significantly different nature which would provide similar benefits with different impacts such as rehabilitation of existing buildings..." (emphasis supplied). (523 F. 2d at 94).

In this case, the FPC looked at some different routes for the Gilboa Leeds line and at some different designs, but it did not look

in any meaningful way* at what witness Burgraf called "system alternatives" (Tr. 3556). That was a fundamental error which requires the FPC approval of the Gilboa-Leeds line to be set aside.

C. The FPC Erred By Closing Its Eyes To Data Showing Important Information In the Record To Be Wrong

The key factual predicate for the FPC's decision in this case -- statistics as to electric power demand and growth in New York City -- is wrong. It has been shown to be wrong by official studies which came into being after the Record was closed in this case. The FPC refused to consider these studies. Therefore,

(1) The FPC's conclusion that the Gilboa Leeds line is needed is not supported by substantial evidence,

(2) The FPC

"has failed to compile a record which is sufficient to support its decision. The Commission has ignored certain relevant factors..." (Scenic Hudson I, 354 F. 2d at 612).

(3) Since this Court in Greene County I directed the FPC to explore "future power demand and supply" (455 F. 2d at 423), the FPC's blinding itself to studies showing the information in the Record as to future power demand and supply to be wrong

"was refusing to correct an apparent error in a report ordered by...this Court. (Hudson River Fisherman's Association v. FPC, supra, 498 F. 2d at 833).

* Mentioning alternatives, but not comparing their "relative environmental pros and cons" (NRDC v. Calloway, supra, 524 F. 2d at 93) does not constitute the "hard look" required by NEPA.

The FPC's conclusion as to the need for the Gilboa Leeds line is based upon power demand and supply data for New York State generally and New York City specifically. All of the electric systems engineers who testified (witnesses Loehr and Boston of PASNY and witness Jessel of the FPC) concluded that under certain circumstances of demand and supply (and with "possible but improbable" catastrophies occurring) the failure to have stronger transmission links between upstate and downstate New York could result in the inability of Blenheim Gilboa Power to be available to New York City. Of course, under different circumstances, this would not occur.

The studies upon which the FPC made its decision were made in 1970 and 1971 (Tr. 377) and were based upon "summer peak loads as forecast for 1974" (Tr. 381). Data as to loads (i.e. consumption) is the key element in making conclusions as to reliability (Tr. 941-942). As PASNY explained its point:

"The need for capacity to transmit power from upstate to downstate New York increases year by year because the load in New York City is increasing faster than generation is being added in the metropolitan area." (Tr. 2018)

The problem with all of these studies is that they are wrong. That they were wrong became evident during the hearing. But Judge Levy prevented evidence of this from being placed in the Record stating:

"In a record of this type, with the hearing extending over a period of time, you always have the problem that figures are constantly being revised and updated and that will continue ad infinitum" (Tr. 3126).

In the same way, the FPC while claiming

"we are approving the Gilboa Leeds line
to meet present needs" (R. 7303, A. 70)

refused to hear evidence that the information in the Record as to such present needs had been shown by other authoritative studies to be materially inaccurate.* The FPC blandly characterized these inaccuracies as "some new circumstance has arisen, some new trend has been observed, or some new fact discovered" which need not stop it from acting on the evidence in the Record (R. 7351, A. 114).

What are the inaccuracies? The inaccuracies are that for the first time in the memory of man, and contrary to all prior studies, reports and projections, electric power loads in both New York State and New York City declined. Indeed, the new data shows that Consolidated Edison loads are not expected to return to the 1973 peak until 1980. (Report of the New York Power Pool pursuant to Section 149-b of the Public Service Law, Vol. 1, pp. 12-13 (1976)).

Thus while the studies in the Record project a peak statewide 1983 summer load of 36,340 mw (Tr. 2025), new data predicts this to be only 27,600 -- some 25% less (removing the need for

* The 1970 National Power Survey on which Dr. Jessel relied for his testimony on need showed 1975 peak loads in New York State to be 22,040 mw. The New York Power Pool statistics in the Record showed 1976 peak loads in New York State to be 24,460. Later studies showed 1975 peak load and 1976 projected peak loads to be 20,001 mw and 21,000 mw, respectively. Taking New York City loads alone, the inaccuracy of the data in the record as to the present needs is even more dramatic. Exhibit I to the original 1968 application for the Blenheim Gilboa Project estimated the 1973 peak load for upstate New York to be 9850 mw (R. 7447). Later studies showed the load to be some 1300 mw less or about 8550 mw. This 15% error meant that even the 1000 mw Blenheim Gilboa Project was surplusage at that time.

nine new 1,000,000 kw power plants). Indeed, at the same time the FPC was blinding itself to these new reports, an Atomic Safety and Licensing Board of the Atomic Energy Commission (now Nuclear Regulatory Commission) on April 26, 1974 was reopening a record on the need for an upstate New York nuclear power plant to "cover the statistical data on the demand for power" in view of the unprecedented "reduction in demand". (In the matter of Niagara Mohawk Power Corp. (Nine Mile Point, Unit 2) AEC Docket No. 50-410). (See also Aeschliman v. NRC, F. 2d (No. 73-1776) (D.C. Cir., July 21, 1976).

As this Court held in Hudson River Fishermen's Association v. FPC, supra:

"By 'donning...'complete blinders'... to a new situation' [citation omitted] the FPC has abused its discretion." (498 F. 2d at 833)

In at least one respect, this case is even stronger than the Hudson River Fishermen's Association case. In that case there was a serious dispute as to the claimed inaccuracy of the data the FPC had relied upon. Here, the inaccuracy of the data the FPC relied on is proven by statistics from the FPC's own Bureau of Power and from PASNY's own New York Power Pool.

A second major area where the FPC has refused to acknowledge the inaccuracy of fundamental data in the record relates to the operation of the Blenheim Gilboa Project. The conclusion with respect to the stability of the Project was based upon computer representations of the statewide electrical systems (Tr. 875-878, 911-912). However, during the hearings, the Blenheim Gilboa Project with the New Scotland and Fraser lines went into operation (Tr. 2975).

Not only did the FPC Staff not investigate whether the actual operation confirmed or disproved the computer generated conclusions (Tr. 2703), but the FPC itself also expressly declined to consider operating history reports (See request at R. 7341, A. 106 and denial at R. 7351, A. 114). As far as we know, these reports indicate that the Blenheim Gilboa Project under actual operating conditions with only the New Scotland and Fraser lines is stable and the power from the Project has been, without exception, reliably delivered to the upstate utilities who are the customers of such power.* (See Tr. 2975-2977) and (R. , A.).

It is not so much that the FPC acted on a stale record and abused its discretion in refusing to reopen the record (although it made these errors) (See Aeschliman v. NRC, supra), as that the FPC failed to compile a complete record and failed to consider all relevant factors.

* * *

While justifying the engineering need for the Gilboa Leeds line on the basis of a multi-phased comprehensive plan, the FPC erred in not reviewing the impacts of such plan as a whole, programmatic alternatives to the plan and data undercutting the premises upon which the plan was based.

* In addition, according to witness Burgraf the availability of Canadian power and the proposed PASNY Canadian Connection (See Greene County III) has fundamentally changed the premises upon which the Gilboa Leeds line need was based (Tr. 3555-3556). It now appears that underground lines carrying direct current are being proposed in lieu of 765 kv overground alternating current lines to carry bulk power to New York City. The FES gives short shrift to this.

II
THE FPC ACTED IN
VIOLATION OF NEPA BECAUSE
NO ADEQUATE ENVIRONMENTAL
STATEMENT WAS EVER
PREPARED

As discussed supra, the FPC's environmental statements are deficient because (1) they myopically focus upon an improperly narrow project scope and (2) they fail adequately to discuss alternatives to the Gilboa Leeds line.* Even if this were not so, the environmental statements would still not satisfy NEPA because they do not even fully and fairly evaluate the limited subject matter with which they do deal.

Both the DES (R. 6253-6437) and the FES (R. 2565-4916), also (a) do not reflect a systematic, interdisciplinary approach, (b) are too generalized and theoretical to be meaningful, (c) are essentially a brief for the FPC Staff's position, (d) do not contain any independent FPC analysis and (e) completely fail to address the special environmental impacts connected with 765 kv transmission

An Interdisciplinary Approach Was Not Used

NEPA §102(2)(A) (42 U.S.C. §4332(2)(A)) requires the FPC to

"utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment."

* The failure to include the DEC letter of comments in the FES is a prima facie violation of NEPA which requires that dissenting views from responsible sources be included. (Anderson, NEPA in the Courts, 209 (1973)).

The FPC's own rules talk about the need to

"utilize a sufficiently imaginative, comprehensive, interdisciplinary approach -- utilizing a broad physical, biological and social overview..." (18 CFR Part 2, Appendix A).

Unfortunately, the FPC Staff environmental statements are clearly the work of a single engineer (Tr. 2797 and R. 2917)*. Practically the only detailed discussion in the documents deals with engineering feasibility and cost. Indeed, the bulk of the discussion of alternatives (See e.g. R. 4655-4673) is an engineer's statement, without a single substantive mention of any environmental factors.

To the extent discussion in the statements addresses non engineering factors, it comes from wholly unqualified individuals. Thus, for example, we have a landscape architect opining on human psychology (Tr. 2572), a biologist theorizing on history and culture (Tr. 2613, 2637-2638) and fisheries biologist trying to analyze economics in the resort industry (see pp. 26, 27, 125 of the FES (R. 4580, 4581, 4690) and Tr. 1850).

Therefore, the environmental statements are deficient for not using an interdisciplinary approach.** (See Akers v. Resor, 339 F. Supp 1375 (W.D. Tenn. 1972)).

* Exhibit 71A (R. 4917) gives a breakdown of "staff basic responsibility for preparation" of the staff Final Environmental Statement. It shows an electrical engineer (Dr. Jessel) as the preparer of 110 pages of the 193 page document.

** The Senate Committee Report accompanying NEPA states:
"Using an interdisciplinary approach... would result in better planning and better projects. Too often planning is the exclusive province of the engineer and cost analyst." (S. Rep. No. 91-296, 91st Cong. 1st Sess. 20 (1969)

A perusal of the environmental statements in this case shows that at the FPC the engineer and cost analyst still reign supreme.

The Environmental Statements Are Generalized and Theoretical

The environmental impact discussion which appears in the beginning of the FES (pp. 20-38, R. 4585-4603) is an abstract generalized text book statement having no relation to the specific proposal under consideration in this case. Indeed, much of it is irrelevant (see argument at Tr. 2798 to 2799). This lack of specificity was a major criticism of the DES made by the New York State Public Service Commission (see FES, p. 294) which commented that the environmental impacts of this proposed transmission line "have not been identified with sufficient specificity to establish a context for evaluation." (See EDF v. Froehlke, 473 F. 2d 346 (8th Cir. 1972)).

For example, the discussion on pages 20-38 of the FES (R. 4585-4803) bears no evidence that it applies specifically to this project. Statements such as: "The land values in which the proposed line would pass will be affected" have no value to anyone. Specifics about this proposed line should have been supplied, detailing how land values will be affected and why, both for the short and long term. Similarly, the discussion of recreational opportunities (FES p. 26) may be a good general statement applicable to many transmission corridors, but where is there any indication that such uses are planned, recommended or feasible for this particular one, and where is any analysis of what kind of recreational opportunities now exist in the areas to be traversed by any line.* Indeed, while

* It is significant to note that neither a recreational plan nor a fish and wildlife plan for its transmission line routes was prepared by PASNY although this was required by the FPC rules (18 CFR 4.41, Exhibits R and S). The Department of Interior criticized this omission (R. 6517). Judge Levy also prevented Greene County from cross examining FPC Staff about recreation (Tr. 1831, 1833-1834) even though the matters being probed had been raised on direct testimony

(Footnote continued on following page)

there is much discussion of mitigating factors, they are always described in a vague and theoretical way. (See e.g. discussion of impact on historical sites at FES p. 15). This issue was picked up by the Economic Research Service of the U.S. Department of Agriculture which commented:

"The section in mitigation or replacement measures...discusses which measures "can" be undertaken. We feel it should consider those measures "will" and "will" not be undertaken." (FES, p. 259)

Likewise the U.S. Forest Service remarked with respect to the mitigation section or the environmental statements:

"But nowhere does the draft indicate that these measures will be taken -- in fact, it seems quite obvious that they will not be taken. What then is the purpose of this section? It tends to be misleading." (FES, p. 260)

The U.S. Department of Health, Education, and Welfare agreed stating:

"There is no statement that any of these methods will in fact be implemented. We would like to see clarification as to which methods will be actually used on this project." (FES, p. 267).

The Final Environmental State Is No More Than A Brief

Although the FPC's rules recognize that Staff may take an environmental position, a clear distinction is made between a statement of environmental position and the Staff environmental statement. Unfortunately, in this case, Staff misconstrued its mandate

(Footnote continued from previous page)

(Tr. 1314, lines 22-24) It has long been held that the FPC in ruling upon an application must take recreational aspects into consideration. Udall v. FPC, 387 U.S. 428 (1967) and Scenic Hudson I.

and proceeded to produce an argumentative, conclusory brief rather than the balanced, objective analysis of environmental impact required by law. (See EDF v. Corps of Engineers, 470 F. 2d 289 (8th Cir. 1972) cert. den. 412 U.S. 931 (1973)). No more illustrative example of this exists than the summary and contemptuous analysis at pages 146-178 of the FES of the highly critical comments received by Staff on the environmental statement from other governmental agencies. This discussion is in the nature of a reply brief and completely neglects to be responsive to the policies which were intended to be served by the comment procedure under NEPA.

Another example of this is Staff's selective use of prior agency comments. Things that are favorable to Staff are recited, but things unfavorable are ignored. Thus from reading FES, pp. 142-144 one does not know that the basic conclusion in 1971 of the ^{of} letter referred to as representing the consolidated views/New York State agencies was that PASNY's planning process (and the one adopted by Staff in the Statement) was inadequate.* (See R. 5827-5839).

Economic costs and benefits are always specifically described in detail (see e.g. FES, pp. 43-47), but these are never compared

* The PSC said: "we are not persuaded that the corridor recommended by the Applicant is best from an environmental point of view." The PSC asked for a "broader regional study of potential corridors for transmitting this electric power." The PSC concluded "we believe that a further evaluation of alternative corridors is desirable prior to making a decision." Why does Staff ignore these comments at pp. 142-144 and only recite those consistent with its predetermined conclusion? The detailed and careful written comments made in 1971 by Greene County (R. 5790-5826) are (a) omitted, (b) not commented upon or responded to, and (c) not even referred to. As noted above (p. 19), the highly critical comments of DEC are completely omitted from the FES.

with social or environmental costs or benefits. Likewise, where adverse environmental impacts are noted, compensating benefits are found in the next sentence (see e.g. FES, p. 26); but where adverse economic factors are noted, beneficial impacts, such as vastly increased generating capacity for the whole system (see the summary dismissal of alternative (9) at FES, pp. 46-47) are ignored.

There Has Been No Independent Staff Analysis

Greene County I previously criticized the FPC for the failure to do its own independent work:

"The Commission appears to be content to collate the comments of other Federal agencies, its own staff and the intervenors and once again to act as an umpire." (455 F. 2d at 420).

To comply with Greene County I, the FPC by rule directed its Staff to

"conduct a detailed independent analysis of the action" (18 CFR §2.81(b)).

However, as the FES candidly states (pp. 7 and 174), it is nothing more than a regurgitation of the pre Greene County I hearing in this case and the Intervenor's cross examination of the Applicant's witnesses and Staff. In addition, Staff has used "additional information" supplied by the Applicant and Intervenor (p. 5). Except for some nitpicking over minor route variations (pp. 179-180), Staff did no meaningful independent work.

Notwithstanding its clear obligation to do independent analysis, Staff in this case blandly accepted all studies and projections made by PASNY or other members of the utility industry.

Dr. Jessel, the only electrical engineer presented by Staff, did no independent studies, did not verify assumptions made by PASNY and made no effort to check into PASNY's performance or future plans that might affect the need for a line.

For example:

Q. "Did you or any members of your staff do any load flow and stability studies?"

A. "No.*I had some information available to me which was filed - in fact on two different reports here, one on the Northeast Power Coordinating Council, which was a floor diagram which I had available to me.

"We also received as you probably know annually from every electric power system in the country information on peak loads for the peak hours..." (Tr. 1691)

And:

Q. "Now you are making certain assumptions on the direction and amounts of the flow."

A. "I know what the flows are now."

Q. "What are they?"

A. "They are now from east to west."

Q. "What is the magnitude of the flow?"

A. "I don't have the data. But I can get it for you. It's in the Form 12 data..."
(Tr. 1692)

The Form 12 referred to is one filed by each utility annually with the FPC. (Tr. 2730).

It is thus clear that Staff relied entirely on the electric industry in evaluating PASNY's application. Staff did not even independently check the data or assumptions. (Tr. 1725-26).

* PASNY witness Loehr testified that you could not evaluate a transmission system without such studies. (Tr. 875).

Thus, when asked about the results of a certain test performed by PASNY witness Loehr, Dr. Jessel replied:

"Let me put it this way: the one study which I have seen was made by witness Loehr. I have not seen the assumptions he made as to loading, as to the inertia constant, and as to the assumed loadings..." (Tr. 1726)

With respect to a host of other important issues, Staff failed to inform itself so as to be able to do a meaningful job of protecting the public interest. There follows a list of some of Staff's omissions:

- (A) On Power Authority Pot Head Failures - "I have not looked into their systems." (Tr. 1597)
- (B) PASNY Contracts For Sale of Power - "I do not (know)." (Tr. 2663).
- (C) Firm Blenheim Gilboa Power Committed by PASNY - Staff does "not at the moment know." (Tr. 2665)
- (D) On Applications To Licensing Bodies Regarding Other Parts of the Proposed 765 kv Grid -

"I do know it would not be to the Federal Power Commission. As to whether they applied to any state agency, I do not know."
(Tr. 2669)

- (E) On the Operating History of the Existing New Scotland and Fraser Lines -

Q. "Do you know for how long these two lines have been energized?"

A. "No, I am sure I do not..."

Q. "Do you know or have you heard anything about the operating history of those two lines?"

A. "I have not, no." (Tr. 2703)

It is interesting to note that Judge Levy's defense of the FPC staff in his Initial Decision (R. 2071, A. 26) is confined to recounting some hiking trips Staff members made to Greene County.

But on the basic issues in this case -- and the fundamental premises upon which Staff's Final Environmental Statement was based -- there was no independent FPC or FPC staff analysis. There was nothing more than a collation of materials provided by others.

The Environmental Statements Fail to Discuss The Special Impacts of 765 kv Transmission

The basic authority which the FPC gave to PASNY in Opinion No. 751 was to build a 765 kv transmission line between Gilboa and Leeds to be operated initially at 345 kv. Yet the FPC environmental statements do not discuss at all the special impacts which 765 kv transmission may have upon human health and safety, the FPC commenting:

"The possible impact of 765 kv transmission with respect to audible noise, production of ozone, induced currents or effects on the earth's radiation belts are likewise irrelevant. We are not approving a 765 kv transmission line, but merely requiring that the line to be built be convertible to 765 kv..." (R. 7352, A. 114)

This approach is directly contrary to Chelsea Neighborhood Associations v. U.S. Post Office, supra (See discussion at p. 40 supra).

Lest anyone think that the environmental impacts, especially as they relate to human health and safety, are not worthy of discussion, it should be pointed out that on motions made by several New York State agencies including the PSC Staff, DEC, Department of Health and Department of Agriculture, the PSC has been investigating these health and safety questions for several years in PSC cases 26529 and 26559. (see N.Y. Times, Section 1, p. 41, September 9, 1976 and PSC Opinion No. 76-12).

Any environmental statement on a proposal for 765 kv transmission which does not even address these basic health and safety issues (primarily audible noise, induced electric shocks, ozone, effects on pacemakers and the biological effects of electric and magnetic fields) should prima facie be held inadequate.*

* * *

Whether looked at broadly or examined narrowly, the DES and FES fail to meet the mandates of NEPA, the FPC's own rules and Greene County I. Without a detailed environmental statement available to accompany the proposal through the FPC review processes, to draw meaningful comments from others, to be available for cross examination or to document the required "hard look" at environmental considerations, the FPC's decision in this case cannot stand. It must be set aside.

* This Court has held that

"the consideration of...special hazards to the public health, safety and welfare are vital to any impact statement, and numerous statements have been overturned by their failure to address these questions." (NRDC v. NRC, supra F. 2d at

(See also Judge Oakes comments on the hazards of 765 kv transmission in Greene County III, 528 F. 2d at 44, footnote 17).

III
THE CONDUCT OF THE HEARING
CONTAINED SO MANY ERRORS
AS TO PRECLUDE THE COMPILATION
OF AN ADEQUATE RECORD

One of the genuinely frustrating aspects of a case such as this to one of its participants is that a Judge skilled in shielding himself from review can make hundreds of errors which, taken as a whole eviscerate the hearing as a fair mechanism for the trial and discovery of facts, but escape unscathed because the errors are lost or camouflaged in a truly voluminous Record and because when compared to a sweeping conclusory decision on the ultimate issues, each such error may seem small.

This is compounded by the apparently well settled rule:

"The judicial process, taken after administrative fact-finding, does not lightly accept a challenge to the fairness of the hearing officer" Andrews v. Knowlton, 509 F. 2d 898, 907 (2d Cir. 1975)

Nevertheless, it is Greene County's final point in this brief, amply illustrated in the discussion of the facts and the points, supra, that Judge Levy conducted himself in a prejudicial manner which poisoned the administrative fact finding process.

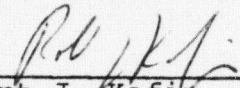
Without a fair opportunity for discovery, with truncated cross examination, with its direct case castrated, and with its motions and arguments largely ignored, Greene County was denied due process and the Record was deprived of a full and fair airing of all relevant factors.

CONCLUSION

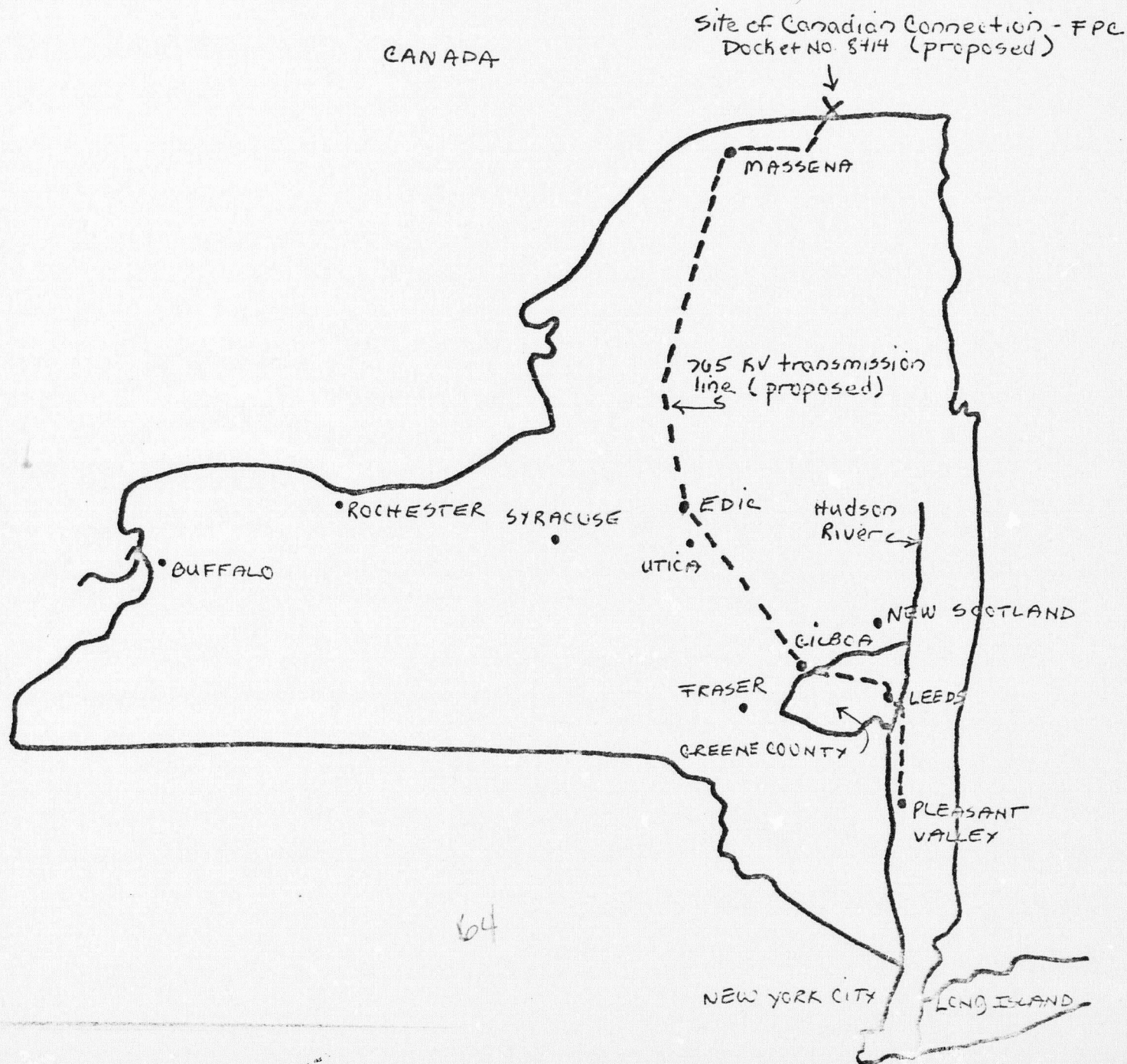
FPC Opinions 751 and 751A must be set aside. The case must be remanded to the FPC for compliance with the Federal Power Act and NEPA.

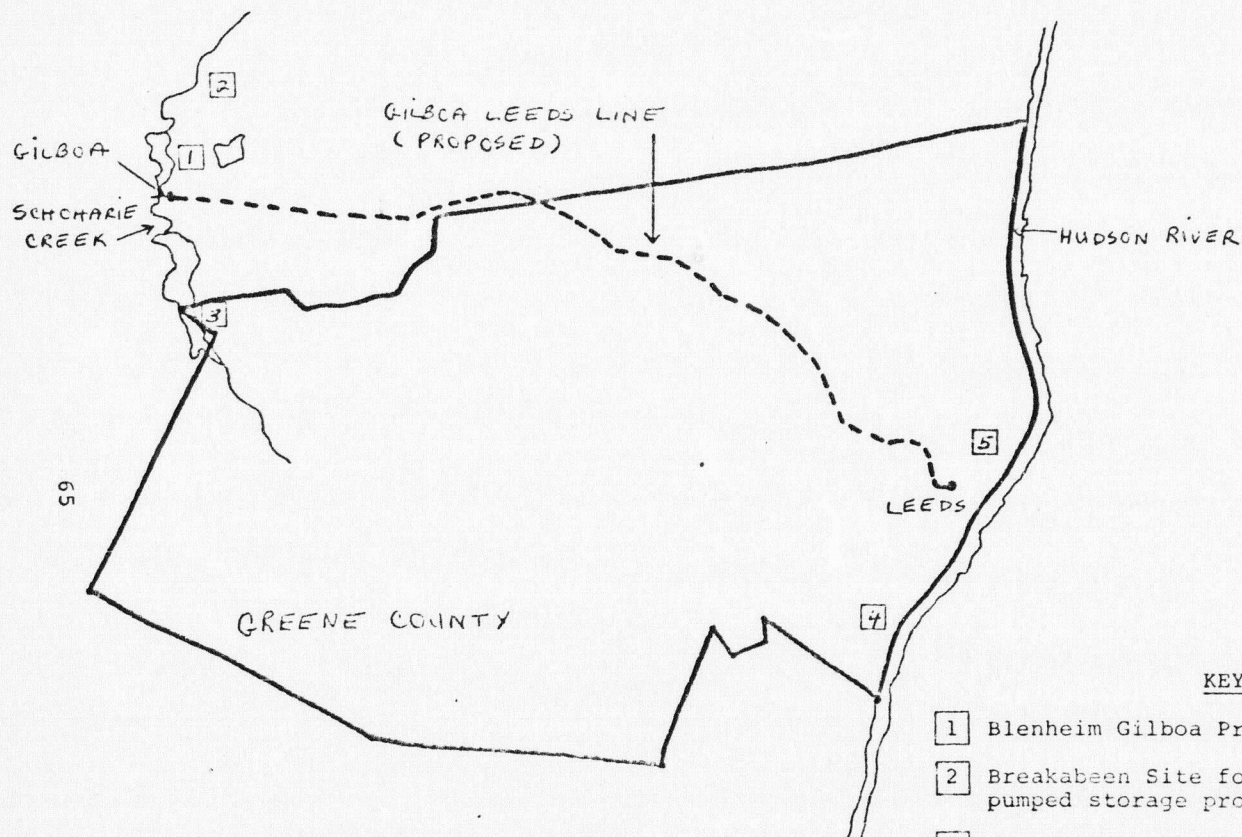
September ²⁷~~23~~, 1976

Respectfully submitted,



Robert J. Kafin
Attorney for Petitioners
Greene County Planning Board and
Town of Greenville
115 Maple Street
Glens Falls, New York 12801
(518) 793-6631





APPROXIMATE SCALE: 1" = 6 miles

KEY

- 1 Blenheim Gilboa Project (FPC #2685)
- 2 Breakabeen Site for future PASNY pumped storage project (FPC #2729) *
- 3 Prattsville Site for future PASNY pumped storage project (FPC #2726) *
- 4 Cementon Site for future PASNY nuclear power plant (NRC #50-549) *
- 5 Athens Site for future PASNY power plant (NYPSC Case 81004) *

ENVIRONMENTAL PROTECTION AGENCY
Regional Office II
Federal Building
26 Federal Plaza
New York, New York 10007

MAR 16 1973

Class. (3)

Mr. Kenneth F. Plumb
Secretary
Federal Power Commission
Washington, D.C. 20426

Dear Mr. Plumb:

This office has reviewed the draft environmental impact statement (EIS) for the proposed Gilboa-Leeds transmission line issued by the Federal Power Commission. Our primary comment on this project deals not with the project directly nor with its environmental impact, but rather with the scope of review that should have been undertaken. The guidelines of the Council on Environmental Quality dated April 23, 1971 and other interpretations of the National Environmental Policy Act (NEPA) have held that the review of federal agency actions affecting the environment should not be done with a segmented approach. Agency actions should be analyzed as to their cumulative effects. We have consistently criticized the piecemeal approach when taken by other federal agencies. For example, the preparation of several EIS's for various segments of a highway defeats the purpose of NEPA. While individual segments may be innocuous, the total, cumulative effects may be undesirable or at least deserving of detailed analysis.

The subject project, the Gilboa-Leeds transmission line, is one constituent of a major power supply project. The initial component, the Blenheim-Gilboa Pumped Storage Plant, was not the subject of any EIS since its construction was begun before NEPA even existed. However, those subsequent projects associated with the line and the existing pumped storage facility should be evaluated as a whole. Specifically these are the (1) Blenheim-Gilboa project, (2) the Gilboa-New Scotland, Gilboa-Fraser, and the Gilboa-Leeds transmission lines, and (3) the proposed Breakabeen pumped storage facility and associated transmission lines. These facilities comprise a subsystem to a much larger network and taken as a whole have the potential of significantly impacting the area in which they are being constructed.

The final configuration of the Gilboa-Leeds transmission line depends on whether the capacity will be 345 Kv or 765 Kv (page 115). 765 Kv capacity will be required if the proposed Breakabeen facility becomes a reality. This depends in large part on the project being acceptable from an environmental impact standpoint. Due to these and other interrelationships, we recommend that the three projects mentioned be the subject of a single environmental statement reissued in draft form for review.

Concerning the substance of the EIS presented, we have the following additional comments. The statement recognizes the potential adverse effects of the transmission line. Among these effects are disruption and siltation of streams, a substantial number of which are crossed by all the proposed routing alternative. The statement should describe the specific measures that will be taken to minimize or eliminate these adverse effects and delineate how these measures will be enforced.

Thank you for the opportunity to comment.

Sincerely yours,

Paul H. Arbesman
Chief
Environmental Impact
Statement Branch

ENVIRONMENTAL PROTECTION AGENCY

Regional Office II
Federal Building
26 Federal Plaza
New York, New York 10007

JUN 1 1973

Mr. Kenneth F. Plumb
Secretary
Federal Power Commission
Washington, D.C. 20426

Dear Mr. Plumb:

We are in receipt of a May 14, 1973 Answer to Intervenor's Notice of Appeal on Project No. 2685, Glenhola-Gilboa, by the Power Authority of the State of New York (PASNY). In that answer, reference is made to our May 4, 1973 letter to PASNY (copy attached) which expanded upon our comments previously made to the Federal Power Commission on the draft environmental impact statement for the Glenhola-Gilboa Project No. 2685.

On page 6 of the above mentioned answer, counsel for PASNY has misconstrued our May 4 letter to be a withdrawal of our March 16 comments on the draft statement. Our comments on that statement have not been withdrawn and remain for the consideration of the Federal Power Commission.

The intent of our May 4 letter to PASNY was to explain the concerns which prompted us to call for a revised draft statement. We further indicated that those concerns could adequately be considered in a subsequent draft statement on the proposed Breakneck facility. To be adequate, however, responses to our concerns must be timely enough to forestall the potential environmental effects that we pointed out in our May 4 letter.

Sincerely yours,

Gerald M. Kansler, P.E.
Regional Administrator

Enclosure

cc: Scott B. Lilly
✓ Neil E. Needleman



RONALD W. PEDERSEN
FIRST DEPUTY COMMISSIONER

STATE OF NEW YORK
DEPARTMENT OF
ENVIRONMENTAL CONSERVATION
ALBANY

March 13, 1973

Dear Dennis:

The Department of Environmental Conservation has completed its review of the Federal Power Commission's draft environmental statement for the "Blenheim-Gilboa Project No. 2605 - New York, Gilboa Leeds Transmission Line Route", issued in January, 1973. In completing our review, we have taken into consideration comments of all appropriate Department divisions and those of our regional units. While it is our usual custom to provide specific and detailed comments, we feel at this time that the subject statement is so entirely deficient, that such reply would be comparable to entirely rewriting the Federal Power Commission's document. However, the following illustrate some of our more general concerns:

1. Transmission corridor alternatives are discussed only superficially and dismissed; major emphasis is devoted to the proposed PASNY Route.
2. Visual impact is discounted by pointing out the adaptability of man and his accommodation to the intrusion in time; totally ignoring the scenic values to be protected in the Durham Valley.
3. Recreational uses of the corridor are discussed in depth; however, a proposed right-of-way without fee simple title creates doubts regarding PASNY's authorization for proposed recreational uses, such references are misleading.
4. Erosion control measures are not discussed; erosion and the resulting siltation of protected streams are significant adverse impacts.
5. General references to possible adverse impacts on fish, wildlife and forest environments are inadequate for environmental analysis; an in depth discussion should be presented.

Generally, the document is an inadequate attempt to answer some of the questions which were raised in the Public Service Commission's letter of June 28, 1971 on the environmental report prepared by the Power Authority. The Federal Power Commission's answers and

responses, for the most part, are defensive and often quite negative.

The statement in most of its content seems to reflect the Power Authority's original environmental report with the minor addition of some selected factual and statistical information. Furthermore, it appears to be hastily compiled; the FPC order for this draft was November 6, 1972 and the statement was completed on or about January 15, 1973. It is difficult to believe and understand how a comprehensive document covering in detail all alternatives and the associated environmental impacts, could be completed in such a short time period.

The document, dealing only with one 35-mile segment of a transmission network may be academic. The minimum environmental impact study and analysis should be one which viewed the generating facility and the substation, and the transmission lines as a single system.

The Gilboa-Leeds transmission line is a first step, and will be basic to a comprehensive regional power plan, therefore, consideration of this one statement alone and by itself is an injustice to the basic letter and spirit of intent of the National Environmental Policy Act of 1969 and the Greene County Planning Board versus F.P.C. court decision. Any analysis of this one line is superficial without consideration of the environmental impact of the long range power production of the northeast.

We urge you to convey our position on the draft environmental statement to the Federal Power Commission. Furthermore, we suggest that the State of New York be consulted by the F.P.C. for guidance in preparing an appropriate and proper environmental statement for the action under consideration.

Thank you for your consideration of this Department's position.

Sincerely,

Mr. Dennis Rapp
Director, Office of
Environmental Planning
Public Service Commission
44 Holland Avenue
Albany, New York

WWC:ng
cc: Messrs. Curran, Elliot
T. King, RWP File